

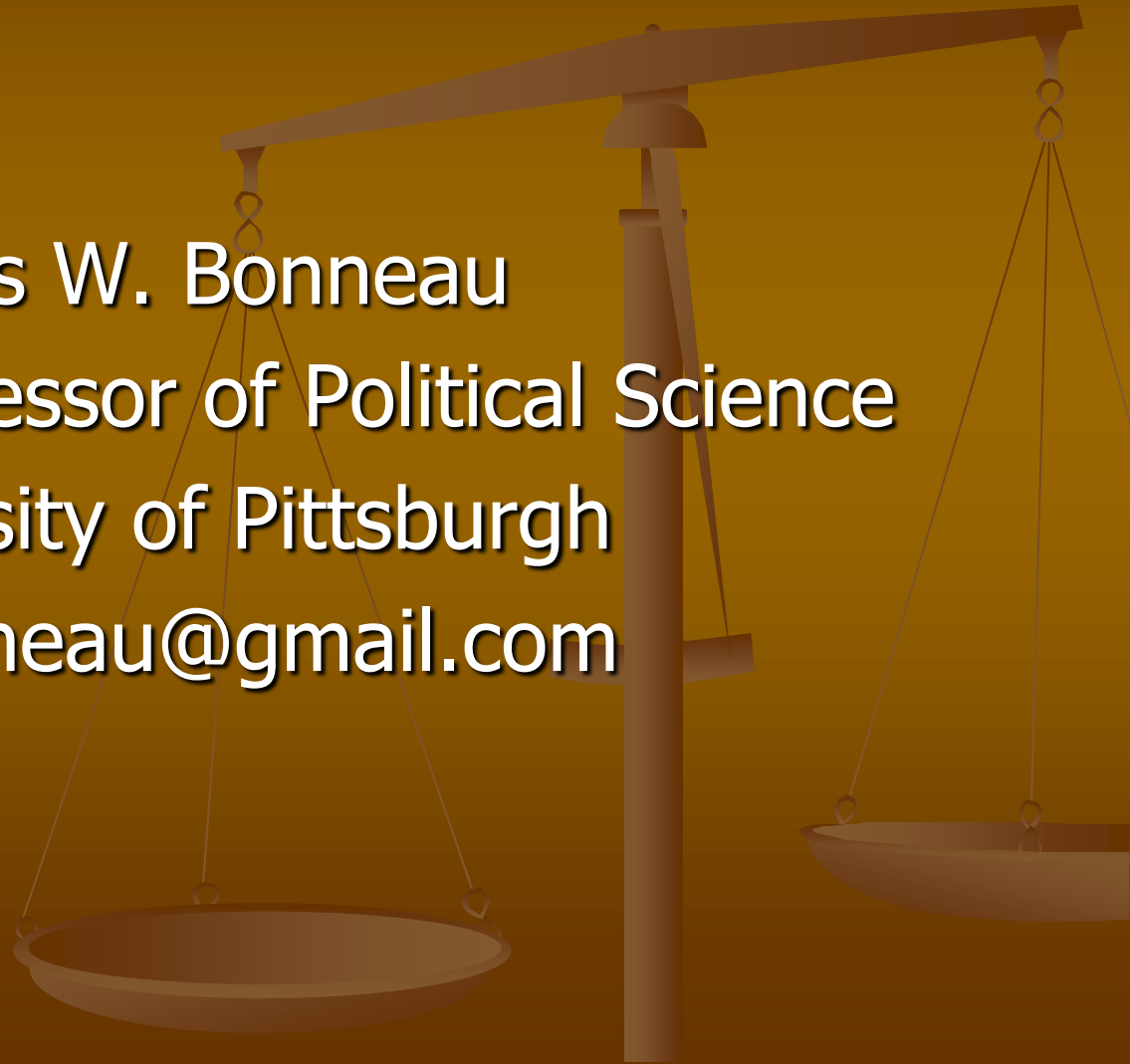
Presentation to the West Virginia Independent Commission on Judicial Reform

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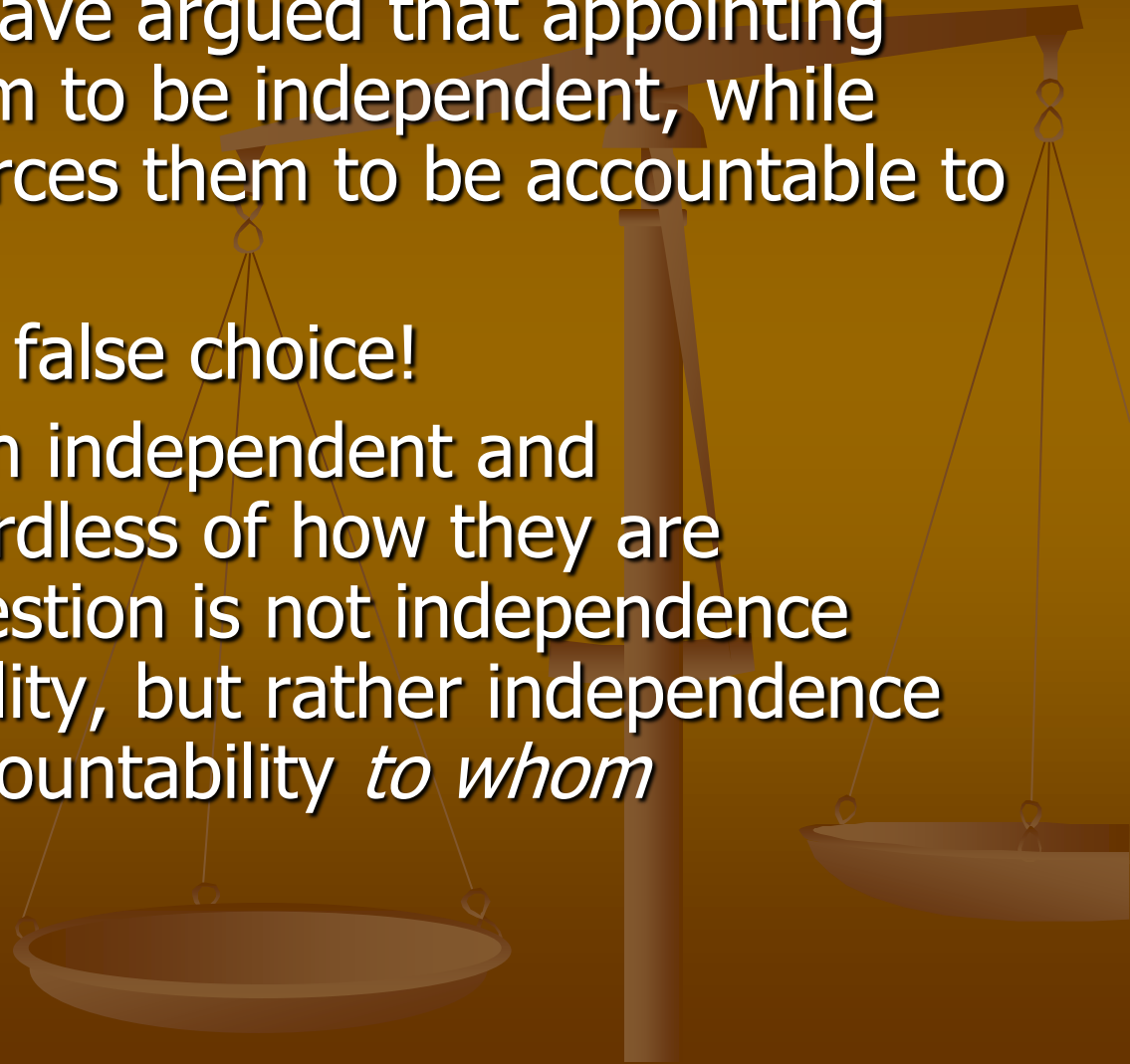
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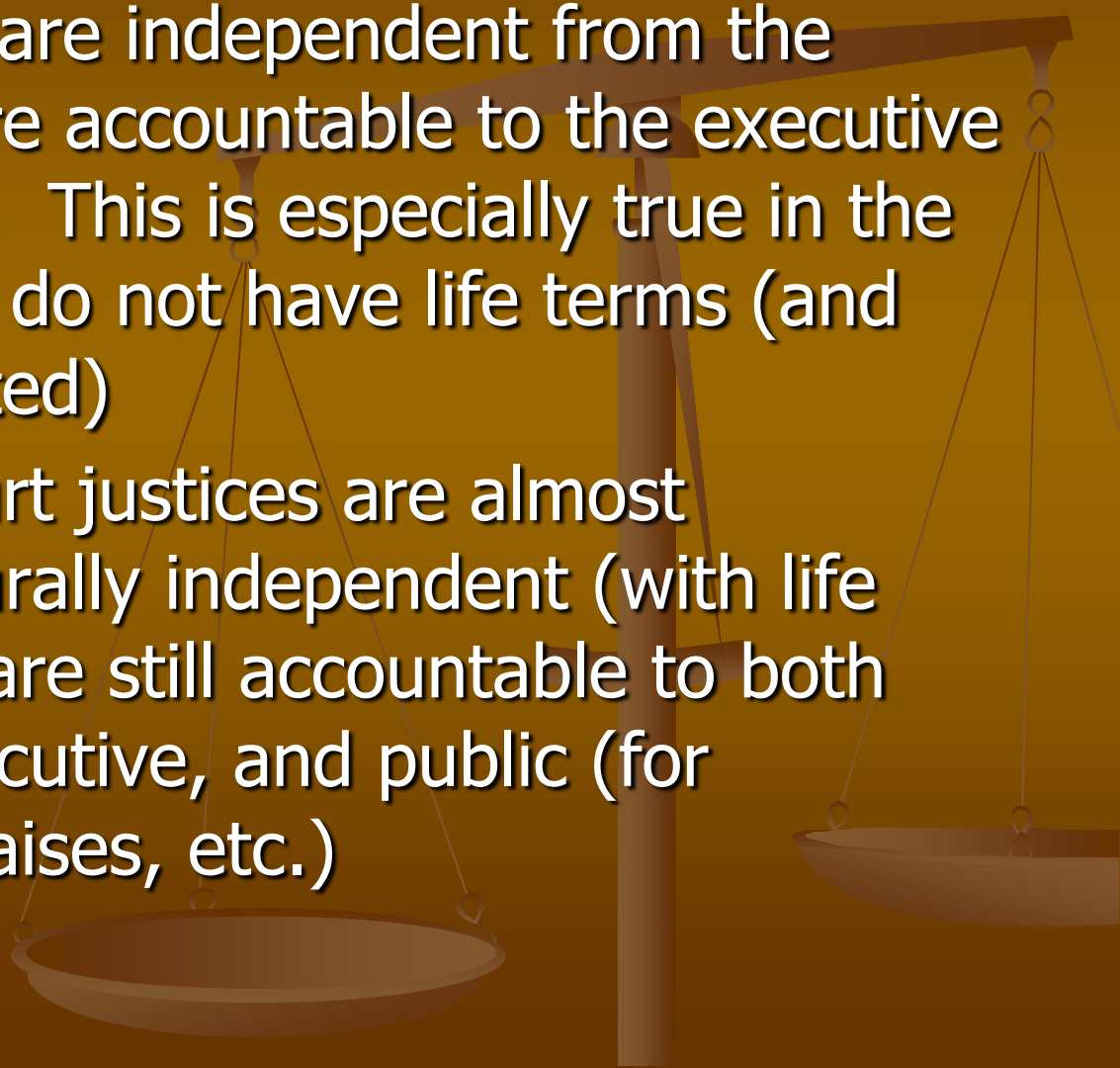
Myth #1: Independence versus Accountability

- Several scholars have argued that appointing judges allows them to be independent, while electing judges forces them to be accountable to the electorate
- However, this is a false choice!
- All judges are both independent and accountable, regardless of how they are selected. The question is not independence versus accountability, but rather independence *from who* and accountability *to whom*



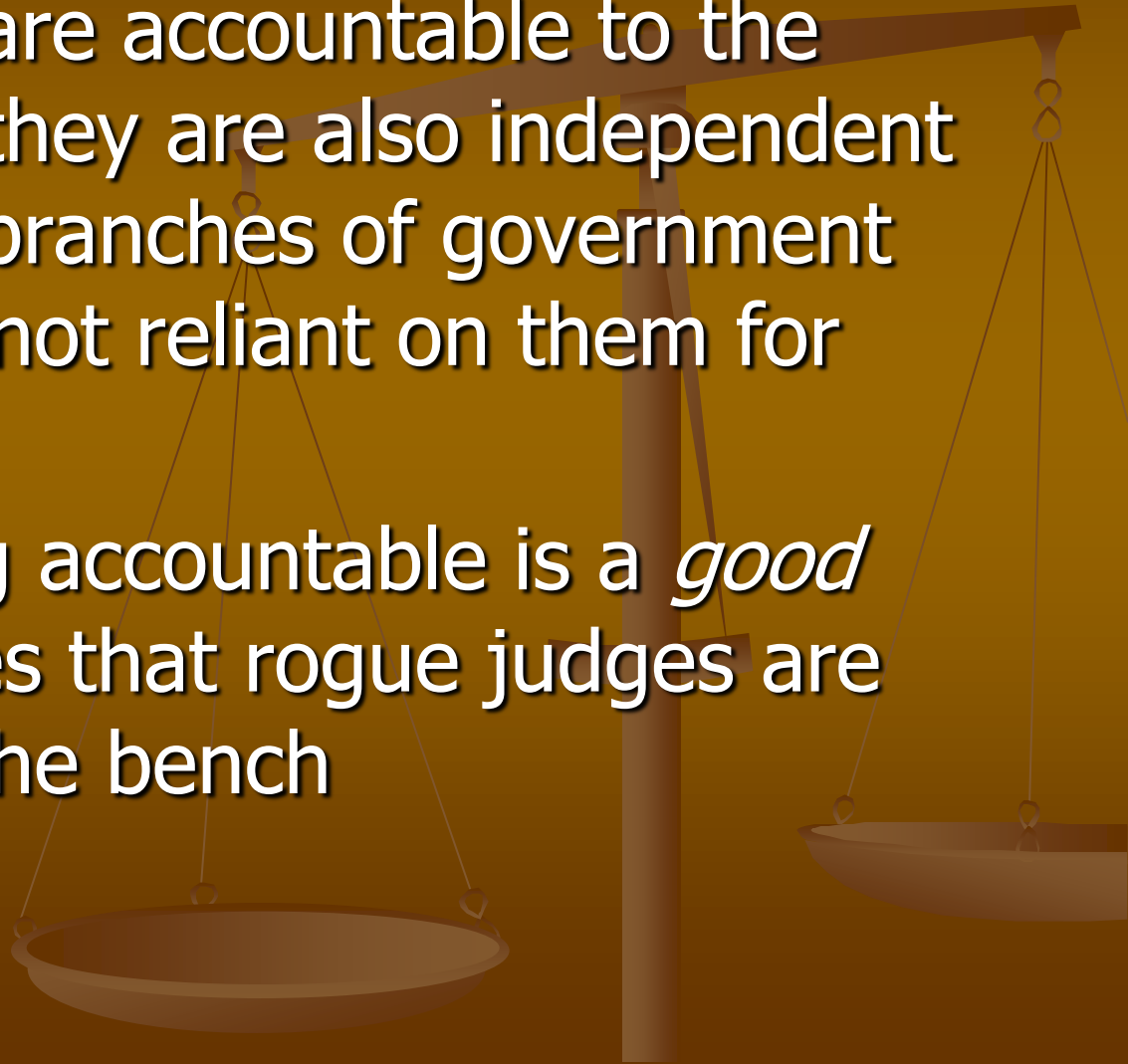
Appointed Judges and Accountability

- Appointed judges are independent from the public, but they are accountable to the executive and/or legislature. This is especially true in the states where they do not have life terms (and must be reappointed)
- U.S. Supreme Court justices are almost completely structurally independent (with life tenure), yet they are still accountable to both the Congress, Executive, and public (for compliance, pay raises, etc.)



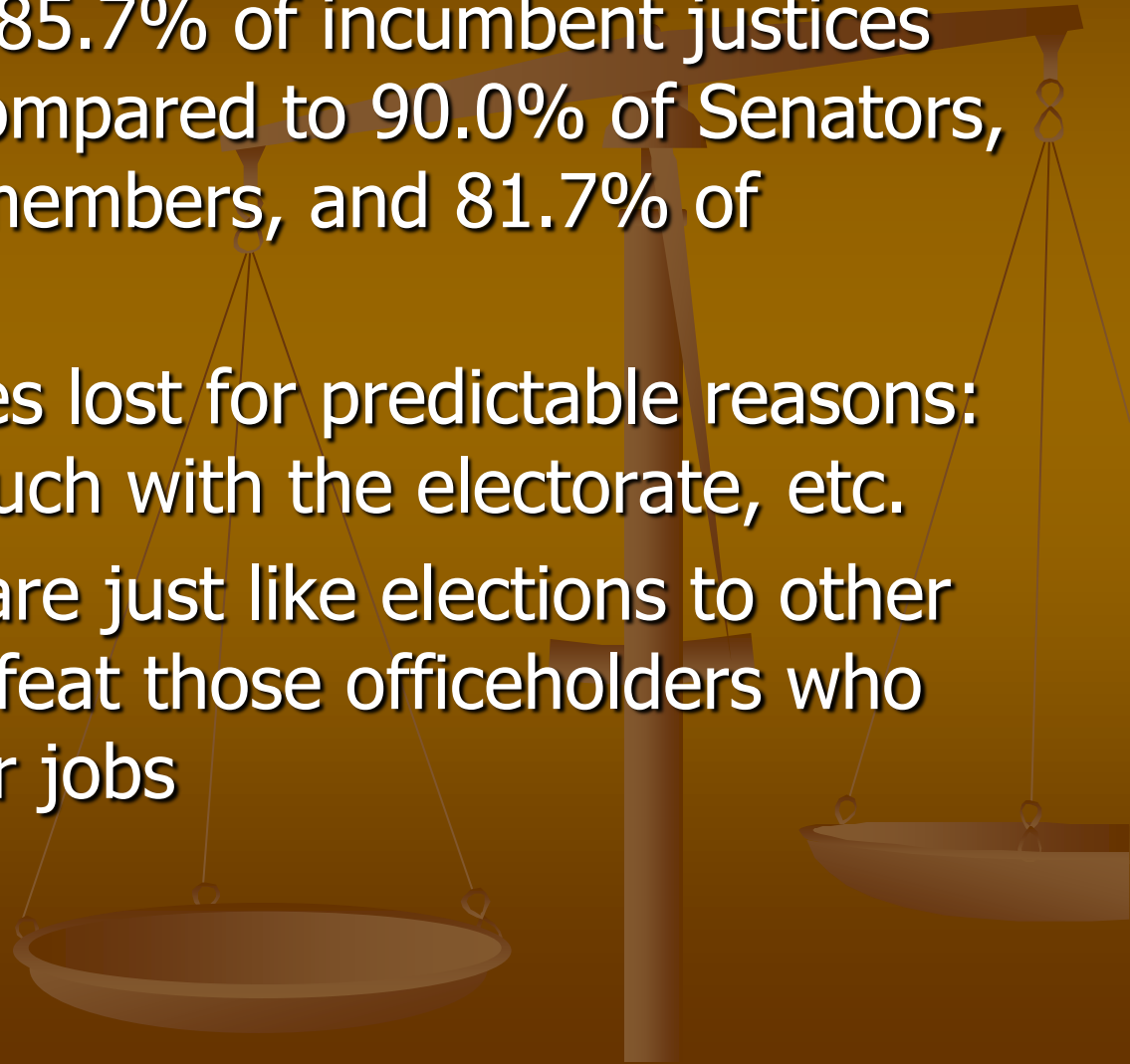
Elected Judges and Independence

- Elected judges are accountable to the electorate, but they are also independent from the other branches of government (since they are not reliant on them for reappointment)
- Moreover, being accountable is a *good* thing: it ensures that rogue judges are removed from the bench

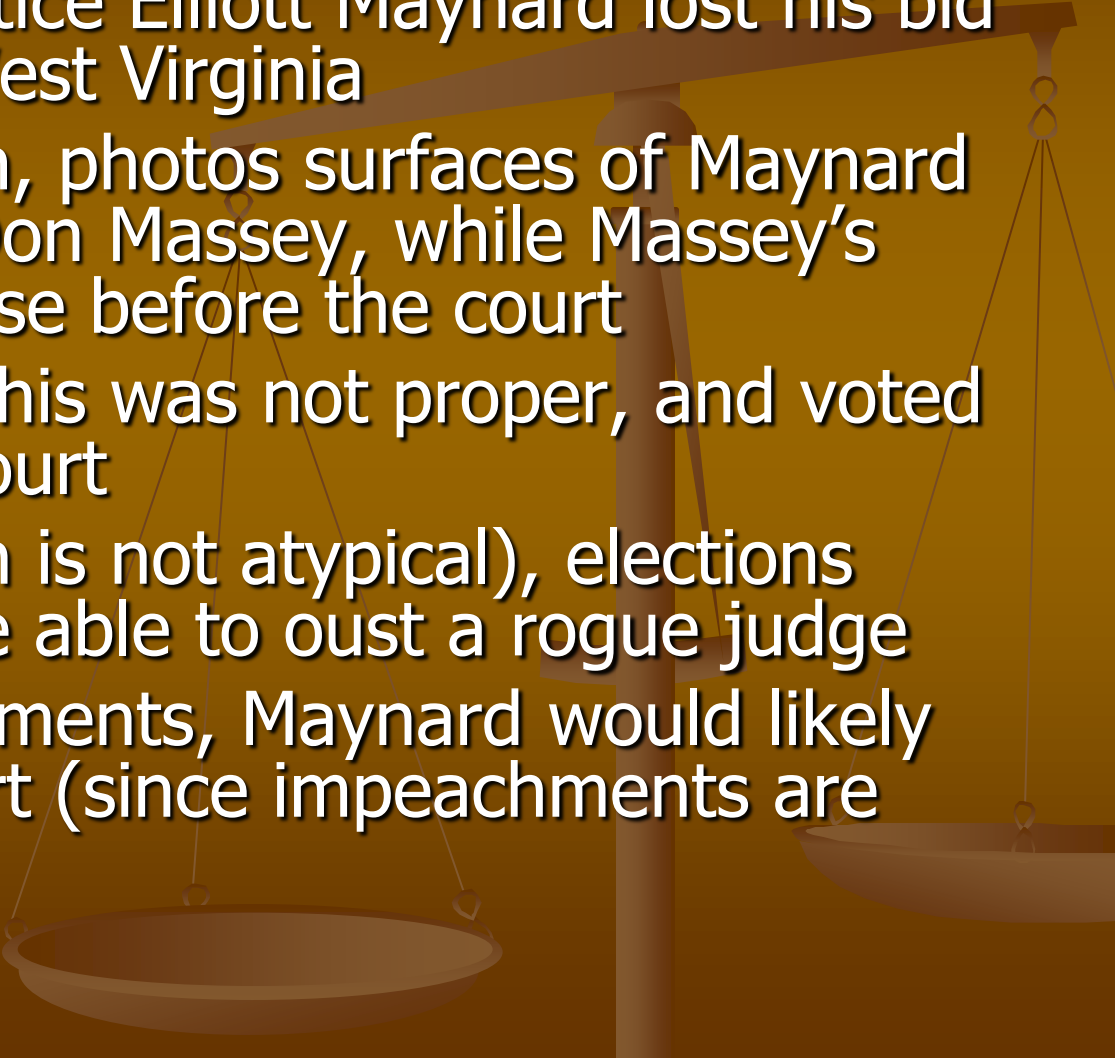


Myth #2: Incumbents Are Subject to the Whims of Voters and Routinely Lose

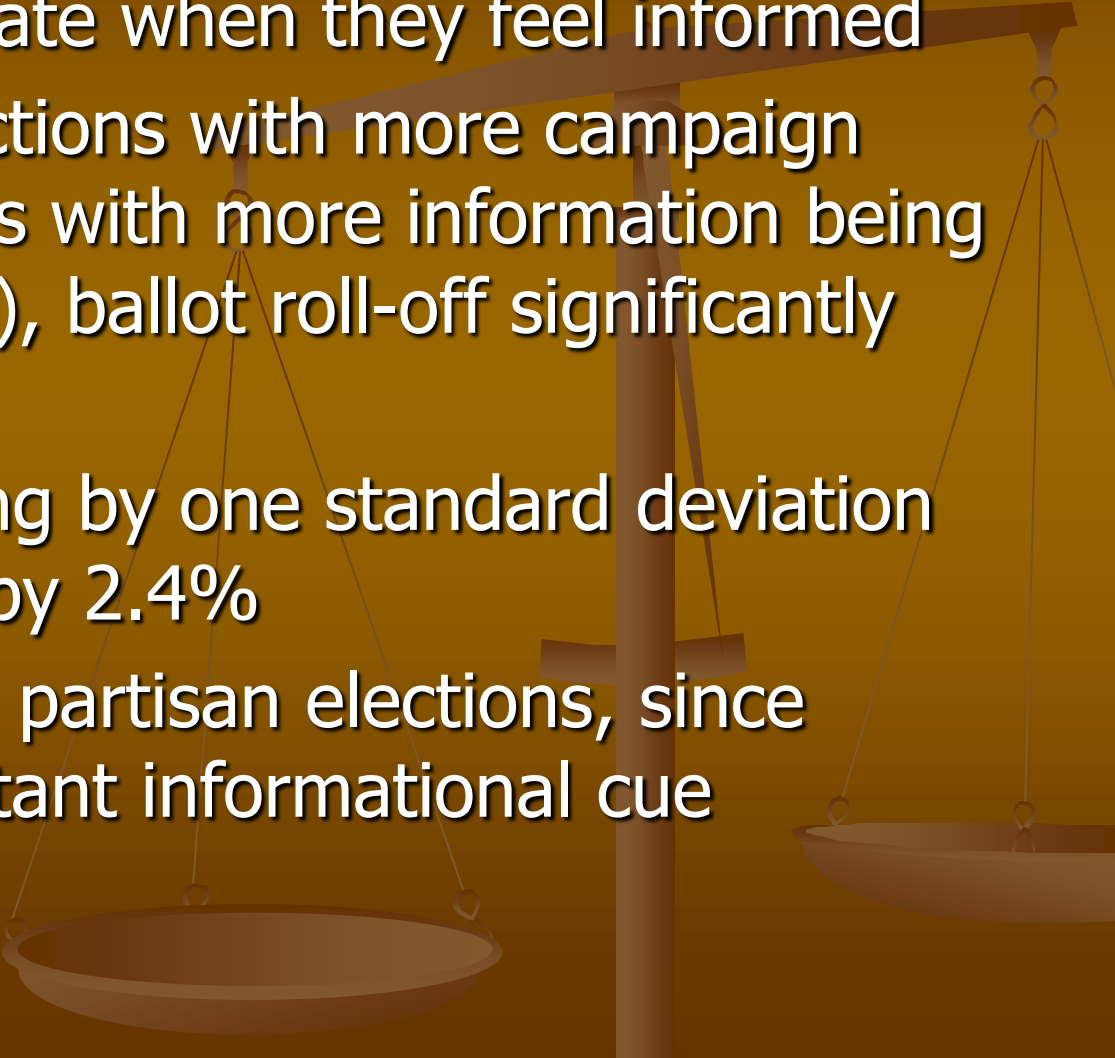
- From 1990-2004, 85.7% of incumbent justices were reelected, compared to 90.0% of Senators, 94.9% of House members, and 81.7% of governors
- Most of the justices lost for predictable reasons: scandal, out-of-touch with the electorate, etc.
- Judicial elections are just like elections to other offices: voters defeat those officeholders who are not doing their jobs



Incumbents Losing Case Study

- In 2008, Chief Justice Elliott Maynard lost his bid for reelection in West Virginia
 - Before the election, photos surfaced of Maynard vacationing with Don Massey, while Massey's company had a case before the court
 - Voters in WV felt this was not proper, and voted Maynard off the court
 - In this case (which is not atypical), elections work: voters were able to oust a rogue judge
 - If WV had appointments, Maynard would likely still be on the court (since impeachments are quite rare)
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Myth #3: Voters Do Not Participate in These Elections

- Voters DO participate when they feel informed
 - Specifically, in elections with more campaign spending (and thus with more information being provided to voters), ballot roll-off significantly decreases
 - Increasing spending by one standard deviation decreases roll-off by 2.4%
 - Also less roll-off in partisan elections, since voters have important informational cue
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Voters Like Elections

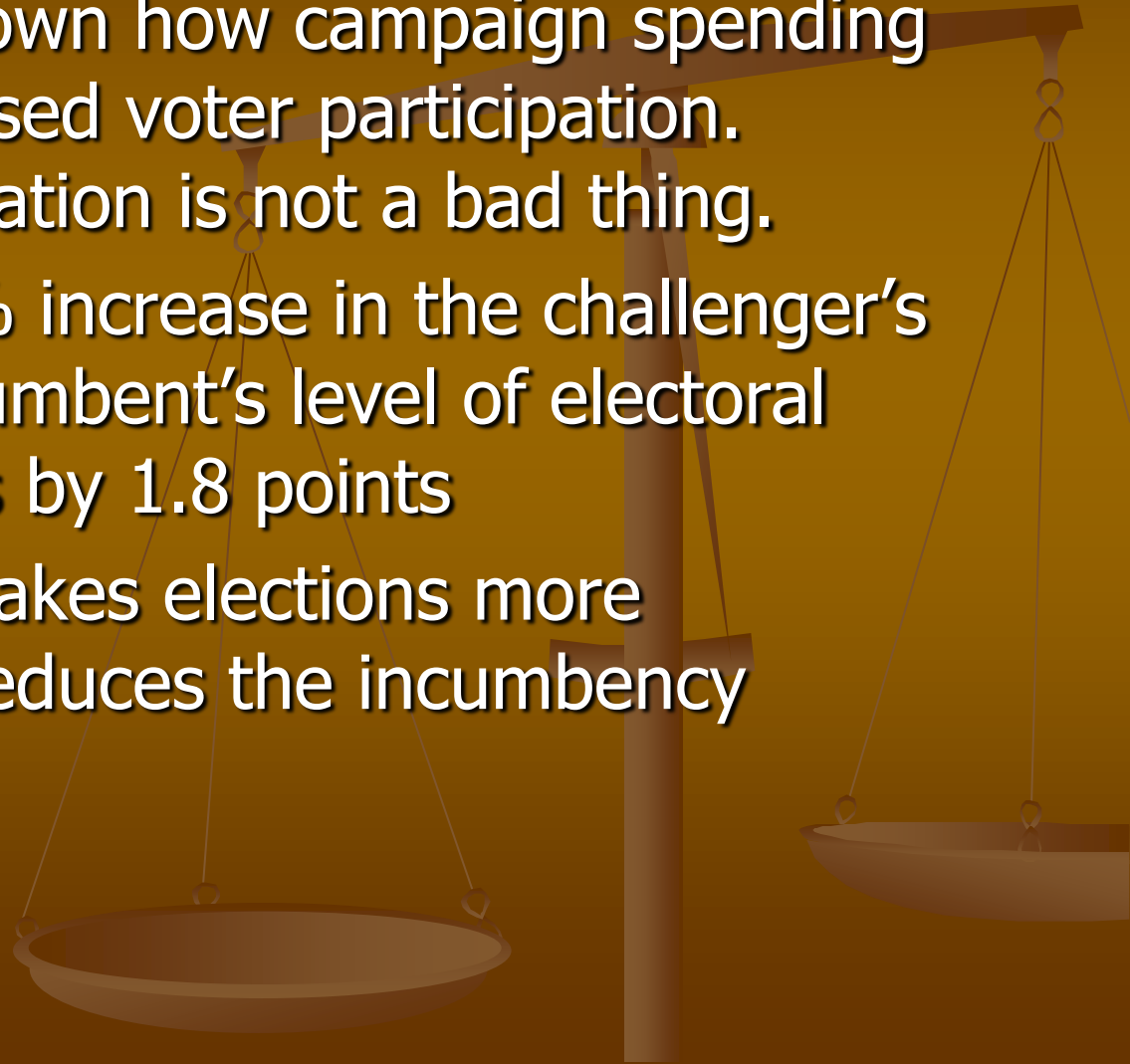
- A 2002 survey of voters in North Carolina found that 77% claimed they were interested in the last judicial elections, and 81% felt that judges should be elected
- A 2008 survey in Minnesota indicated that 73% of respondents “sometimes” or “always” vote in elections and 92% agreed (or strongly agreed) that it is important for judges to be elected by the public
- These surveys are consistent with just about every survey done at the state or national level

Myth #4: Voters Do Not Participate Meaningfully

- Even if we can show that voters participate in these elections, that does not mean they are able to participate meaningfully
- Fortunately, the evidence suggests that voters do behave in a rational manner as well
- Specifically, when an incumbent is challenged by a quality challenger (one with prior judicial experience), her vote share decreases by 4.7%, other things being equal
- Given that the average share of the incumbent's vote was 56.8% from 1990-2000, this could well mean the difference between victory and defeat

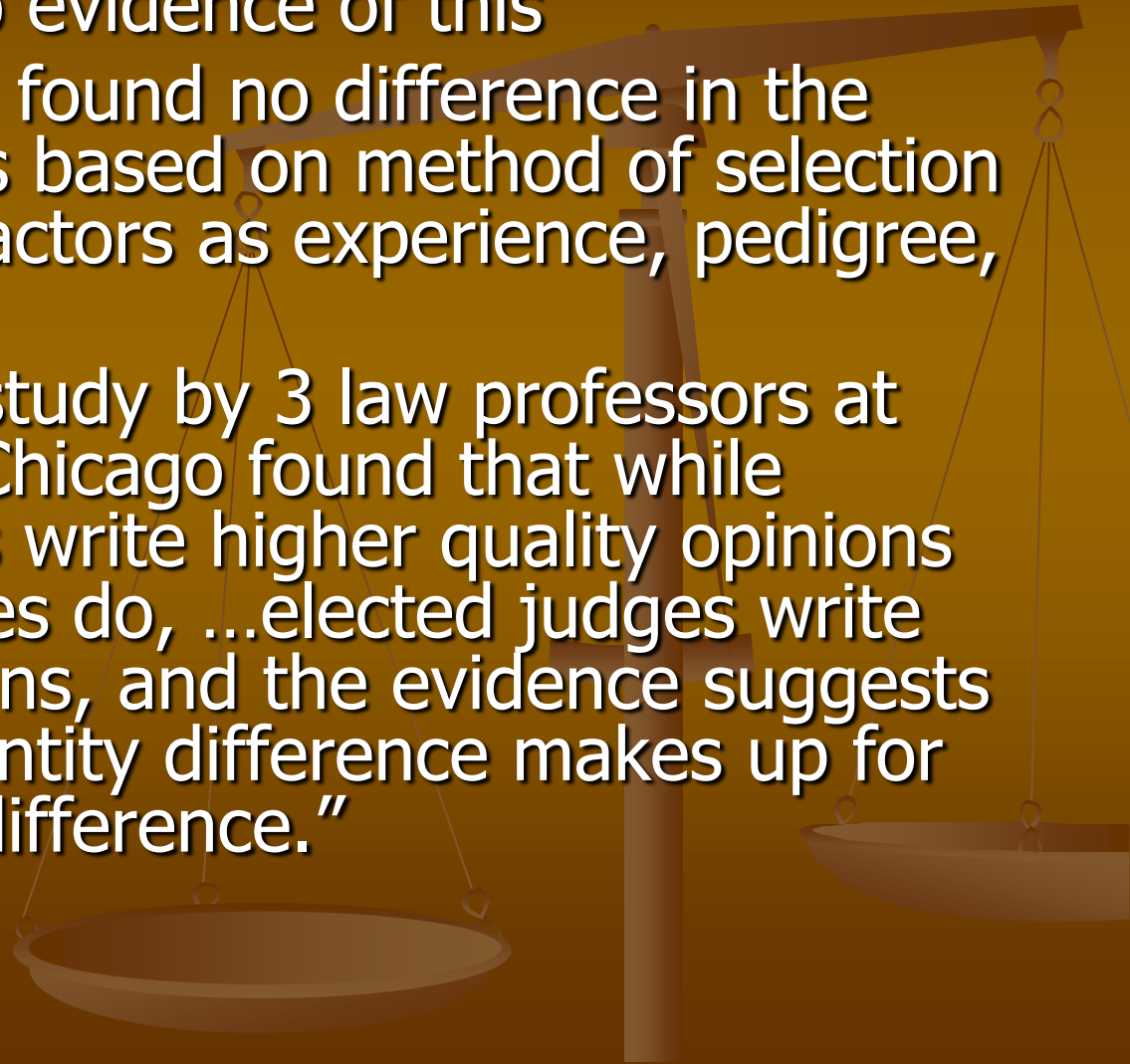
Myth #5: Campaign Spending is a Bad Thing

- I have already shown how campaign spending can lead to increased voter participation. Increased participation is not a bad thing.
- Also, for every 1% increase in the challenger's spending, the incumbent's level of electoral support decreases by 1.8 points
- Thus, spending makes elections more competitive and reduces the incumbency advantage



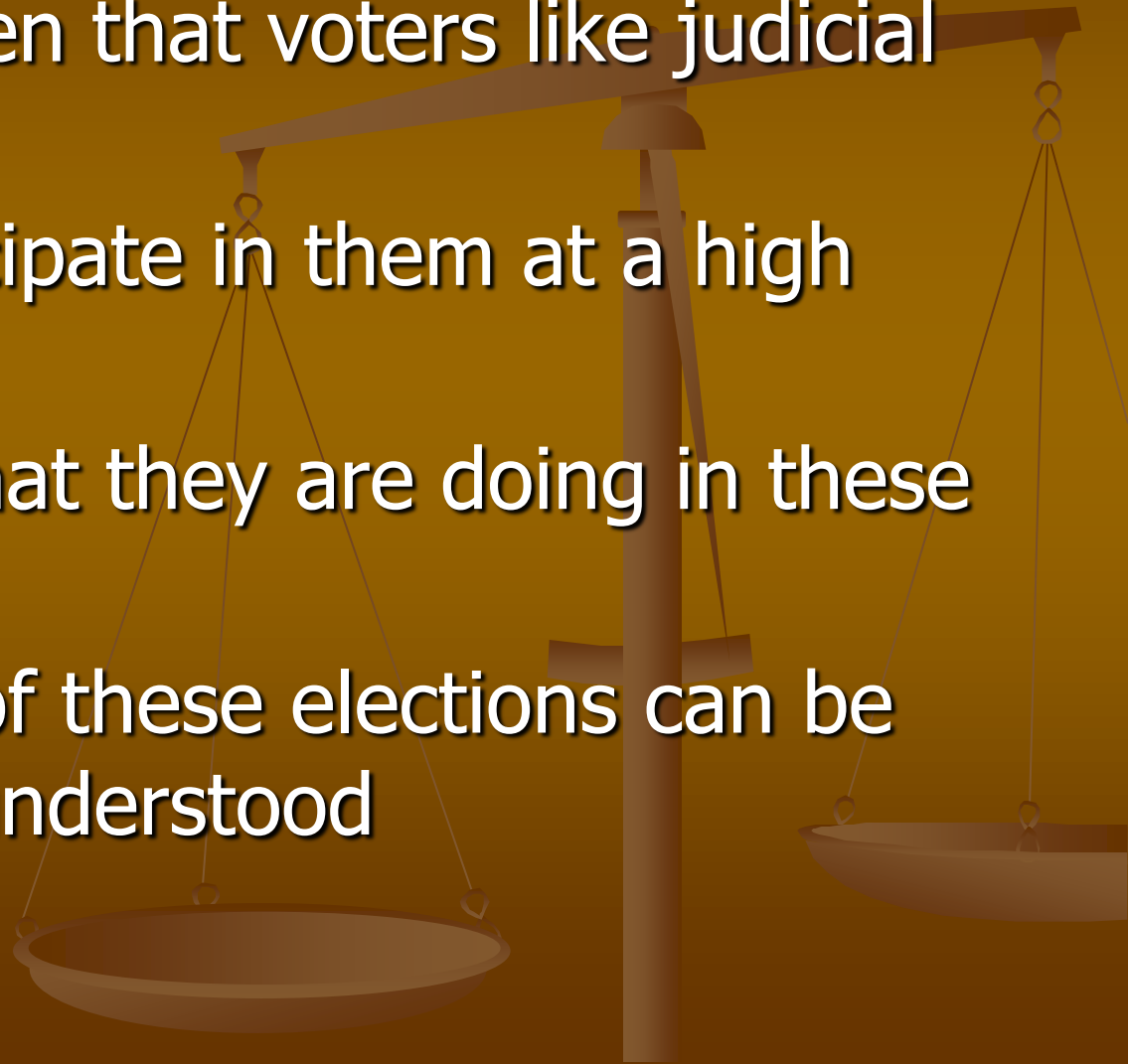
Myth #6: Judges Who Are Elected are of Lower Quality

- There is simply no evidence of this
- Most studies have found no difference in the “quality” of judges based on method of selection (looking at such factors as experience, pedigree, etc.)
- Indeed, a recent study by 3 law professors at the University of Chicago found that while “appointed judges write higher quality opinions than elected judges do, ...elected judges write many more opinions, and the evidence suggests that the large quantity difference makes up for the small quality difference.”



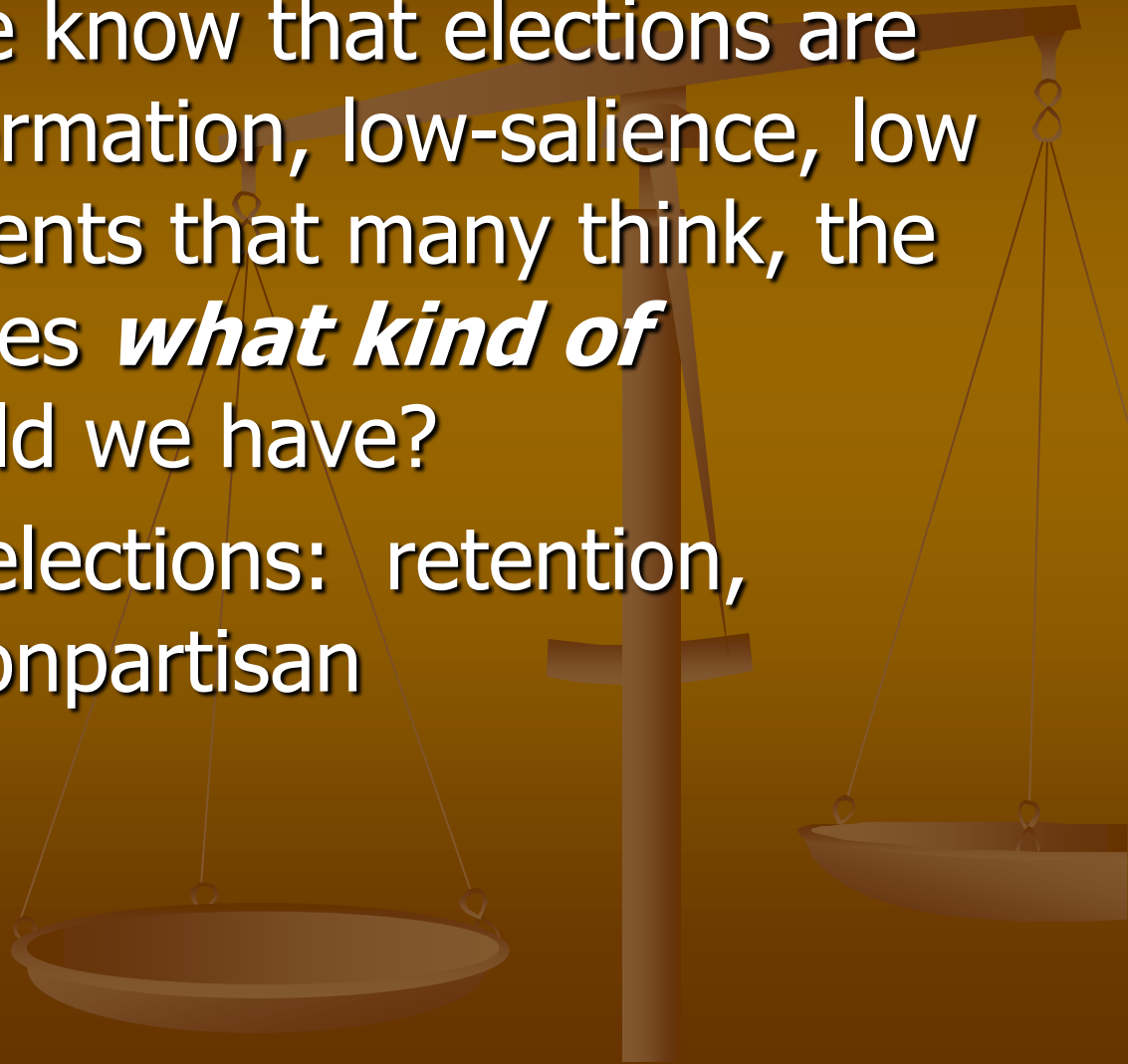
Summary

- So, we have seen that voters like judicial elections
- They also participate in them at a high rate
- Voters know what they are doing in these elections
- The outcomes of these elections can be systematically understood



What Kind of Elections *Should* We Have?

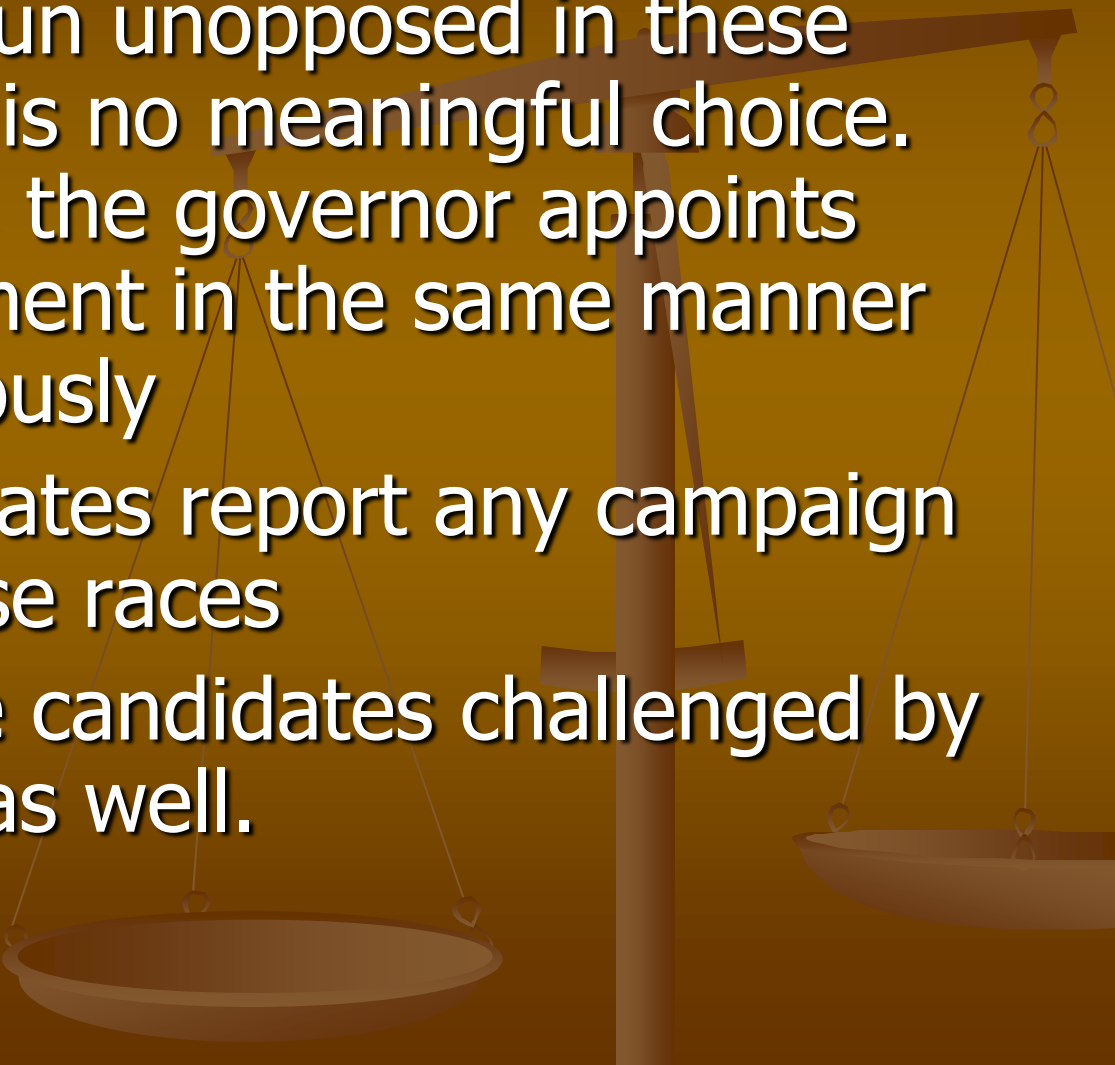
- So, now that we know that elections are not the low-information, low-salience, low participatory events that many think, the question becomes *what kind of elections* should we have?
- Three types of elections: retention, partisan, and nonpartisan



Retention Elections

- Retention elections are elections in name only
- In states with retention elections, judges are appointed by the governor from a list of 3-5 names given to him/her by a nominating commission
- After a brief period of time (1-2 years), these judges face the electorate
- The electorate is simply asked, "Should Judge X be retained?" If a judge receives a majority of "Yes" votes, he/she serves a full term of office (6-12 years) after which he/she will face the electorate again

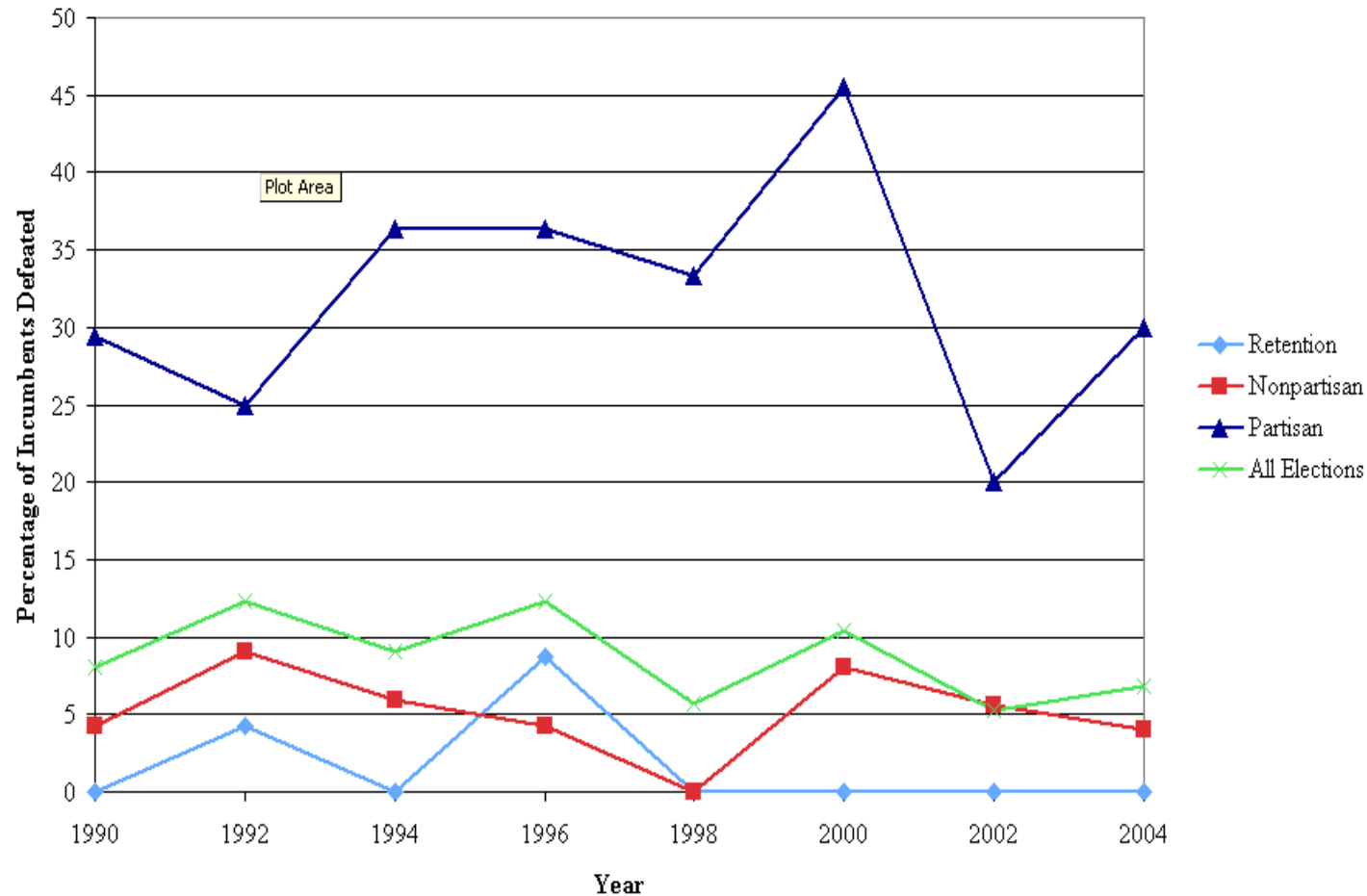
Data on Retention Elections

- Judges always run unopposed in these elections; there is no meaningful choice. If a judge loses, the governor appoints his/her replacement in the same manner described previously
 - Very few candidates report any campaign spending in these races
 - Rarely are these candidates challenged by outside groups as well.
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Retention vs. Other Elections

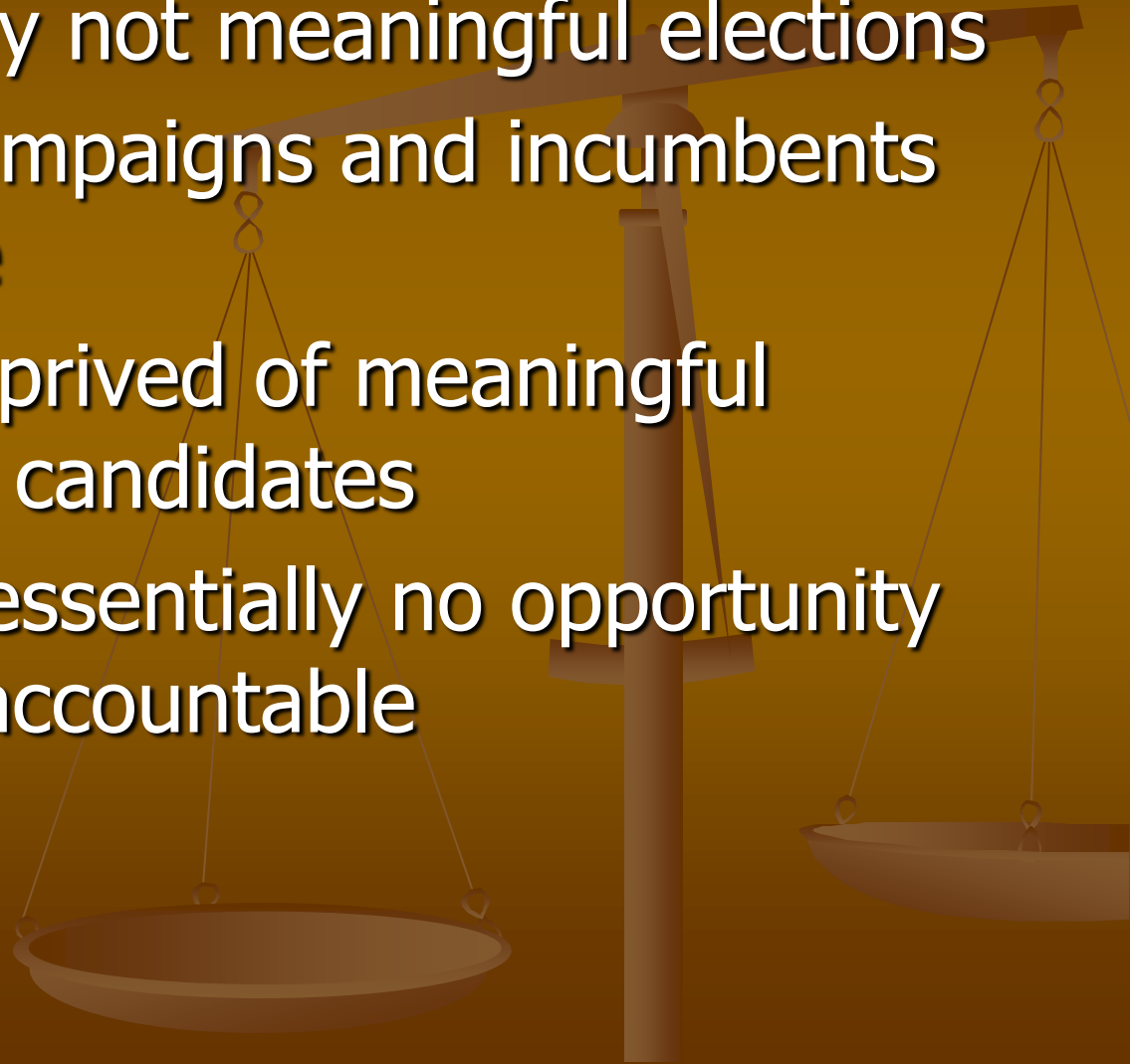
- From 1990-2004, the average percentage of “Yes” votes was 71.0% and this has been increasing in recent years. In contested partisan elections, the average percentage of the incumbent’s vote is 60.9%; in nonpartisan, it is 61.4%
- In this time period, only 3 of 231 (1.3%) incumbents were defeated in retention races. In partisan elections, 32 of 102 (31.4%) incumbents were defeated; in nonpartisan 9 of 172 (5.2%)

Defeats by Type of Election



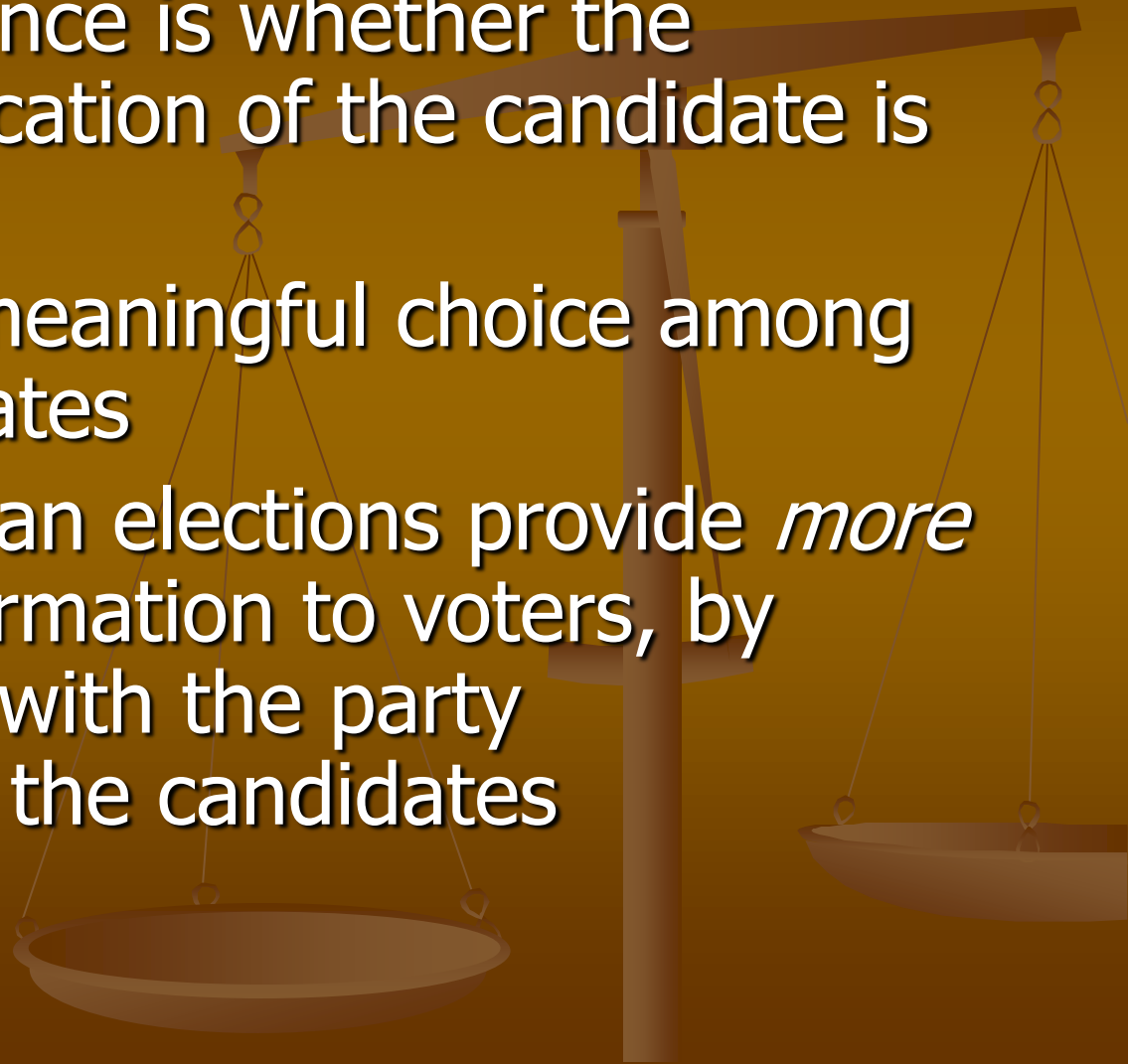
Summary of Retention Elections

- These are simply not meaningful elections
- There are no campaigns and incumbents hardly ever lose
- The public is deprived of meaningful choice between candidates
- The public has essentially no opportunity to hold judges accountable

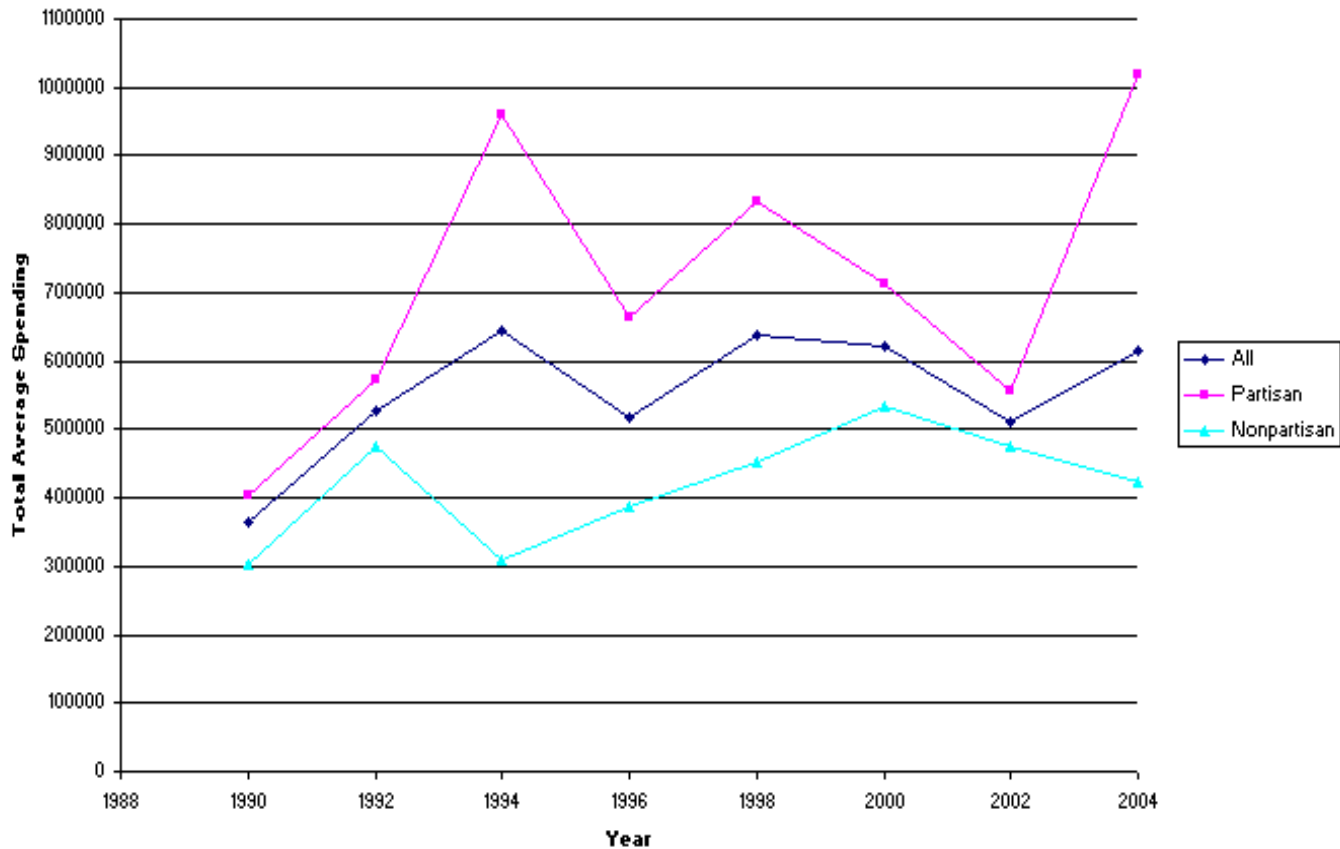


Partisan vs. Nonpartisan Elections

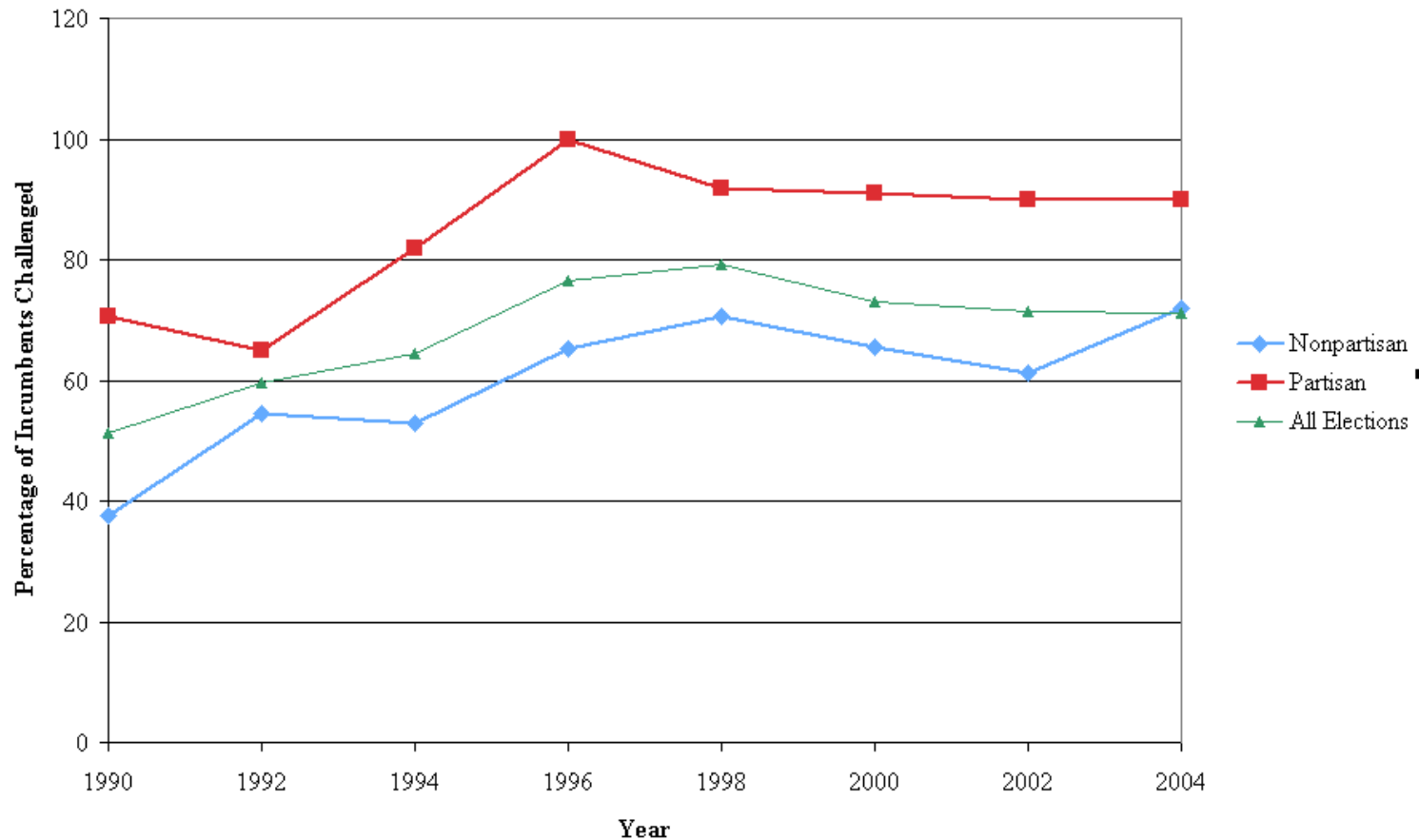
- The only difference is whether the partisan identification of the candidate is on the ballot
- Both allow for meaningful choice among multiple candidates
- However, partisan elections provide *more* meaningful information to voters, by providing them with the party identification of the candidates



Spending in Partisan and Nonpartisan Elections

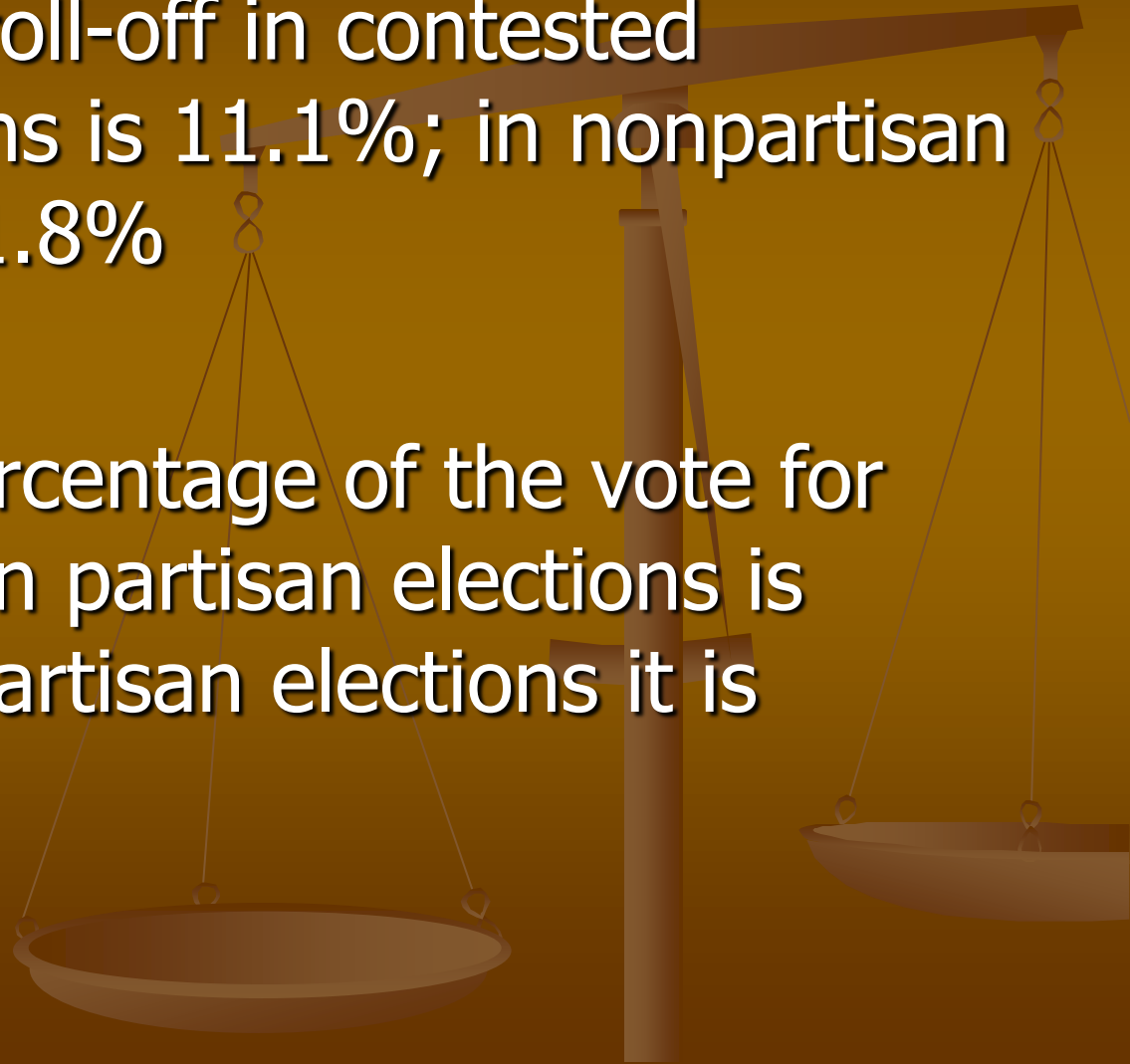


Contestation in Partisan and Nonpartisan Elections

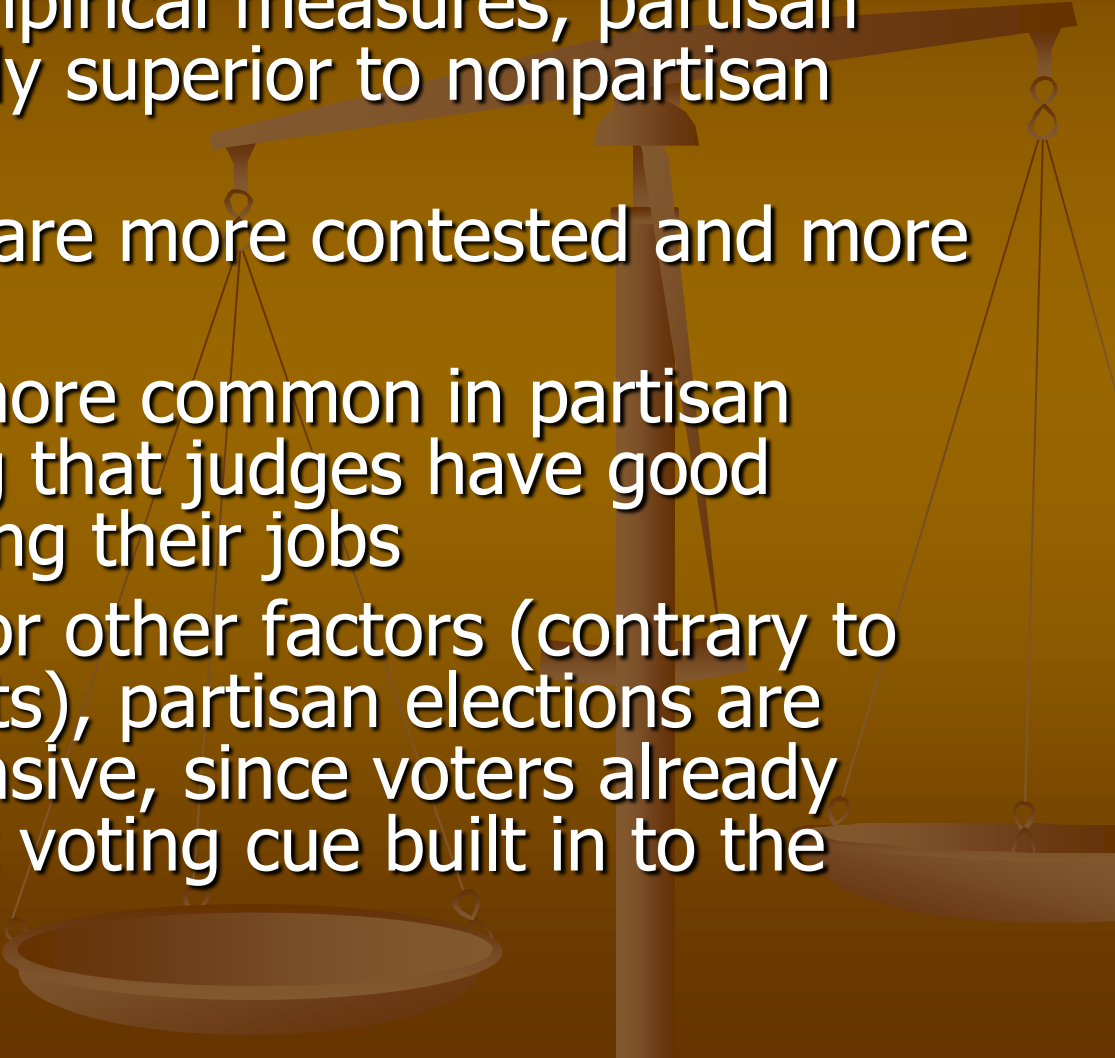


Roll-off and Competition in Partisan and Nonpartisan Elections

- Average ballot roll-off in contested partisan elections is 11.1%; in nonpartisan elections it is 21.8%
- The average percentage of the vote for the incumbent in partisan elections is 55.7%; in nonpartisan elections it is 57.9%

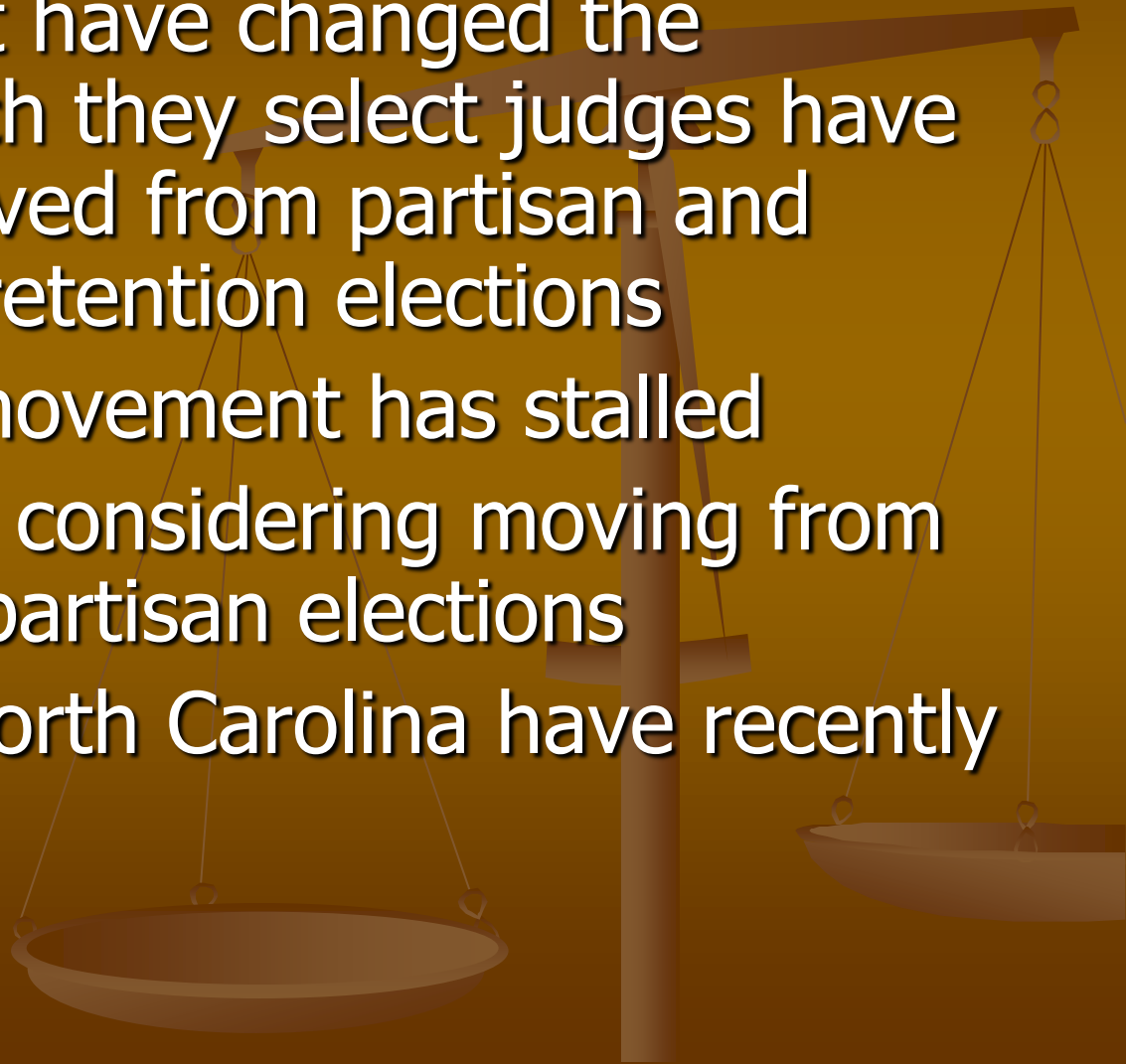


Summary of Partisan vs. Nonpartisan Elections

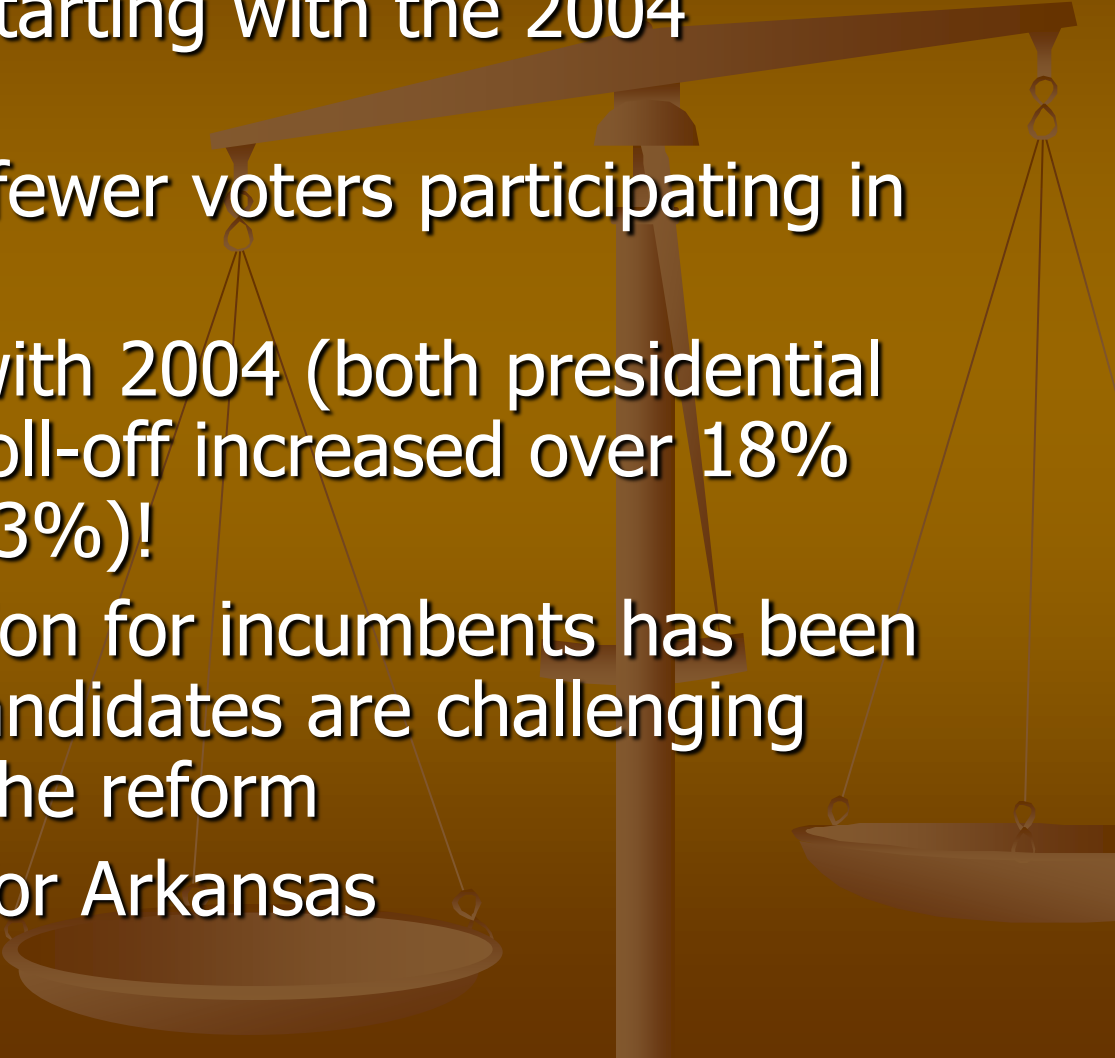
- On all available empirical measures, partisan elections are clearly superior to nonpartisan elections
 - Partisan elections are more contested and more competitive
 - Defeats are also more common in partisan elections, meaning that judges have good reason to fear losing their jobs
 - Once we control for other factors (contrary to the bivariate results), partisan elections are actually *less* expensive, since voters already have an important voting cue built in to the system
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“Reforming” Elections

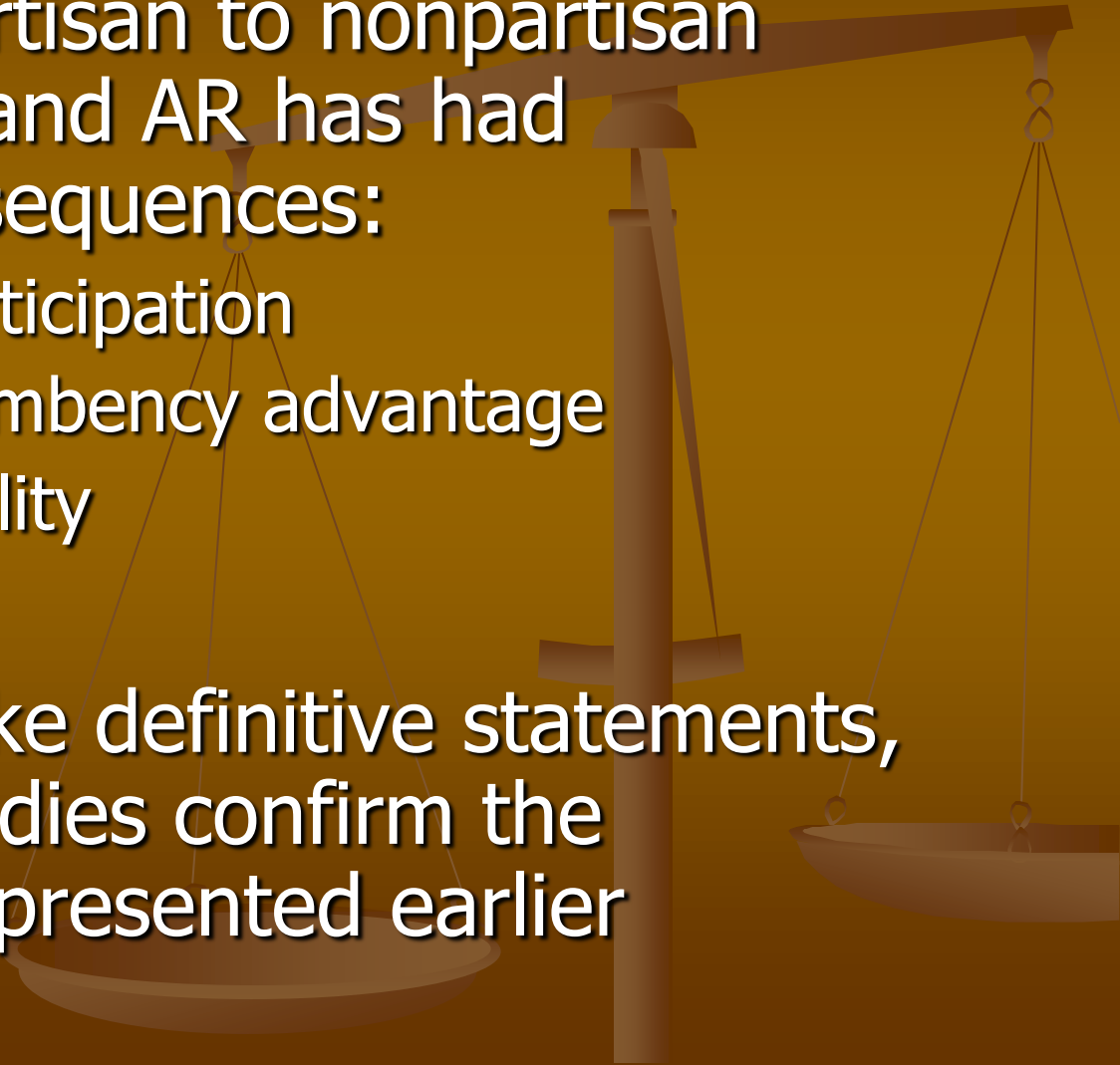
- Most states that have changed the method by which they select judges have traditionally moved from partisan and nonpartisan to retention elections
- However, this movement has stalled
- Now, states are considering moving from partisan to nonpartisan elections
- Arkansas and North Carolina have recently done this



Case Study: North Carolina

- Change in 2002 (starting with the 2004 elections)
 - Since the reform, fewer voters participating in elections
 - Comparing 2000 with 2004 (both presidential elections years), roll-off increased over 18% (from 4.9% to 23.3%)!
 - Electoral competition for incumbents has been reduced—*fewer* candidates are challenging incumbents after the reform
 - The same is true for Arkansas
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Assessing the Reforms

- Moving from partisan to nonpartisan elections in NC and AR has had predictable consequences:
 - Lower voter participation
 - Reinforced incumbency advantage
 - Less accountability
 - Still early to make definitive statements, but the case studies confirm the aggregate data presented earlier
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Conclusion

- Voters not only like judicial elections, but participate in them and make rational decisions
 - Judicial elections are able to promote accountability
 - Partisan elections are the best form; retention elections are not really elections at all
 - Changing institutions can have unintended consequences. For example, a move to nonpartisan elections might actually *increase* the amount of campaign spending
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